Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–250 OF 1987
ABDUL MALIK ISHAK J
6 FEBRUARY 1996

Civil Procedure *— Pleadings — Defence not pleaded — Adducing facts not pleaded in defence — Correct mode to do so — Departure from pleadings — Effect of evidence at trial which is not consistent with pleadings*

Civil Procedure *— Trial — Recall of witness after close of case — Court's discretion — Proper procedure to be adopted by counsel*

Evidence *— Adverse inference — Failure to call witness — Defendant failed to undermine through cross-examination evidence tendered — Whether adverse inference should be drawn — Evidence Act 1950 s 114(g)*

Tort *— Negligence — Professional negligence — Traditional eye healer — Standard of care and skill expected*

Damages (Personal Injuries or Death) *— Personal injuries — Eye — Loss of sight — Loss of future earnings — Absence of salary slips — Whether interest should be awarded*

Damages (Personal Injuries or Death) *— Quantum — Head — Eye injury — Loss of vision in right eye — Loss resulting in total blindness*

The defendant was at all material times practising as a traditional eye healer under the Medical Act 1971. On or about 22 July 1985 the plaintiff, a 49-year-old self-employed man, who was already blind in his left eye, sought treatment at the defendant's practice for his right eye which had about 50% vision. The defendant performed two operations on the plaintiff's right eye on 22 July 1985 and 24 July 1985 respectively using the 'couching' method. The operations resulted in loss of vision in the plaintiff's right eye. The plaintiff sued the defendant for negligence and claimed for general and special damages. At the trial the defendant gave oral evidence which deviated from his pleaded defence and introduced a new defence. The defendant also sought to invoke the presumption of adverse inference under s 114(g) of the Evidence Act 1950 for the failure of the plaintiff to call a witness. Further, the defendant sought to recall a witness where there was no application to do so before the court.

Held, allowing the plaintiff's claim:

(1) It is trite law that parties are bound by their pleadings and are not allowed to adduce facts which they have not pleaded (see p 634E; *Chartered Bank v Yong Chan* [1974] 1 MLJ 157 followed). However any party to a proceeding may raise other issues not pleaded in their pleadings provided they make an application to

amend their pleadings to include the issues to be raised (see p 634H; *Blay v Pollard & Morris* [1930] 1 KB 628 followed). A

(2) When a party in giving his oral evidence in court deviates from his pleaded defence, then his account as narrated to the court must surely be suspect (see p 630D; *PR Panickar v Chwee May Kwong & Anor* [1958] MLJ 136 followed). B

(3) Though it is entirely at the court's discretion to recall a witness after the case is closed in civil proceedings, there must be an application by counsel to recall the witness by way of a notice of motion (see p 633I, 634A; *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226 distinguished). C

(4) No adverse inference under s 114(g) Evidence Act 1950 can be invoked when the party who seeks to invoke the presumption fails to undermine by cross-examination the evidence tendered (see p 633D; *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139 followed). D

(5) The standard of care and skill of a traditional eye healer like the defendant who is registered under the Medical Act 1971 is at par with that of a medical practitioner (see p 637E; *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 and *Chin Keow v Government of Malaysia & Anor* [1967] 2 MLJ 45 followed). The standard of care would therefore be that of an ordinary skilled man exercising and professing to have that special skill and it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. From the evidence, the defendant was in breach of that duty of care when he couched the plaintiff's eye (see p 637E–F; *Ang Tiong Seng v Goh Huan Chir* [1970] 2 MLJ 271 and *R v Bateman* (1925) 94 LJKB 791; [1925] All ER Rep 45 followed). E F

(6) The absence of salary slips to support the plaintiff's claim for loss of future earnings could not be construed against him as the corroborating evidence of the plaintiff's mother that the plaintiff had contributed to her financially was unchallenged. The evidence showed that the plaintiff earned RM500 per month before he became blind and accordingly RM36,000 would be awarded as loss of future earnings (see p 638A–B; *Chan Peng Fook v Kan Pak Lee* [1974] 2 MLJ 197 and *Lim Ah Chi v Tan Ah Mui & Anor* [1969] 1 MLJ 215 followed). G H

(7) The loss of sight to the right eye of the plaintiff rendered him totally blind and as such a sum of RM60,000 was awarded to him as general damages (see p 638G; *Low You Choy & Anor v Chan Mun Kit & Anor* [1992] 3 CLJ 1550 and *Toh Ming Jee v Lau Yiik Ung* (Civil Suit No 198–1979 High Court, Sibu) (unreported) followed). I

(8) No interest would accrue for the loss of future earnings (see p 638H; *Cookson v Knowles* [1978] 2 All ER 604 followed).

A **[Bahasa Malaysia summary**

Defendan telah pada semua waktu material mengamal sebagai seorang pengubat mata tradisional di bawah Akta Perubatan 1971. Pada atau kira-kira pada 22 Julai 1985 plaintif, seorang lelaki berumur 49 tahun yang bekerja sendiri, yang telah buta dalam mata kirinya, pergi B mendapat rawatan di amalan defendan untuk mata kanannya yang mempunyai penglihatan sebanyak lebih kurang 50%. Defendan telah menjalankan dua pembedahan ke atas mata kanan plaintif pada 22 Julai 1985 dan 24 Julai 1985 masing-masingnya dengan menggunakan cara 'couching'. Pembedahan-pembedahan itu menyebabkan kehilangan penglihatan dalam mata kanan plaintif. Plaintif mendakwa C defendan untuk kecuaian dan menuntut ganti rugi umum dan khas. Di perbicaraan defendan telah memberi keterangan lisan yang terpesong daripada pembelaannya yang diplid dan mengemukakan suatu pembelaan baru. Defendan juga telah cuba untuk menggunakan anggapan inferens bertentangan di bawah s 114(g) Akta Keterangan D 1950 terhadap kegagalan plaintif untuk memanggil seorang saksi. Selanjutnya, defendan cuba untuk memanggil kembali seorang saksi di mana tidak terdapat permohonan untuk berbuat demikian di hadapan mahkamah.

E **Diputuskan,** membenarkan tuntutan plaintif:

(1) Adalah undang-undang biasa bahawa mana-mana pihak di dalam satu prosiding adalah tertakluk kepada pliding mereka dan mereka tidak dibenarkan untuk mengemukakan apa-apa fakta yang tidak terkandung di dalam pliding mereka (lihat ms 634E; *Chartered Bank v Yong Chan* [1974] 1 MLJ 157 diikut).Walau F bagaimanapun mana-mana pihak di dalam prosiding boleh membangkitkan isu-isu lain yang tidak diplid di dalam pliding mereka asalkan mereka membuat satu permohonan untuk meminda pliding mereka untuk memasukkan isu yang akan dibangkitkan itu (lihat ms 634H; *Blay v Pollard & Morris* [1930] G 1 KB 628 diikut).

(2) Apabila satu pihak semasa memberi keterangan lisan di mahkamah memesong daripada pembelaan yang diplid, maka penyataan beliau sebagaimana yang diceritakan di mahkamah mestilah sudah tentu sangsi (lihat ms 630D; *PR Panickar v Chwee May Kwong & Anor* [1958] MLJ 136 diikut). H

(3) Walaupun ianya adalah keseluruhannya tertakluk kepada budi bicara mahkamah untuk memanggil kembali seseorang saksi setelah kes ditutup di dalam prosiding sivil, seharusnya terdapat satu permohonan oleh peguambela untuk memanggil kembali saksi tersebut melalui notis usul (lihat ms 633I, 634A; *Ong Yoke* I *Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226 dibeza).

(4) Tiada inferens yang bertentangan di bawah s 114(g) Akta Keterangan 1950 dapat digunakan jika pihak yang ingin menggunakan anggapan itu gagal untuk menjejaskan melalui

pemeriksaan balas keterangan yang dikemukakan (lihat ms 633D; *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139 diikut).

(5) Taraf berjaga-jaga dan kemahiran pengubat mata tradisional seperti defendan yang didaftar di bawah Akta Perubatan 1971 adalah setanding dengan taraf seorang pengamal perubatan (lihat ms 637E; *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 dan *Chin Keow v Government of Malaysia & Anor* [1967] 2 MLJ 45 diikut). Taraf berjaga-jaga adalah oleh itu taraf orang biasa yang berkemahiran yang menggunakan dan mengaku mempunyai kemahiran yang istimewa itu dan adalah memadai jika beliau menggunakan kemahiran biasa yang dipunyai oleh orang kompeten biasa yang menjalankan kemahiran tertentu itu. Dari keterangan, defendan telah memungkiri kewajipan berjaga-jaga itu apabila beliau melakukan 'couching' ke atas mata plaintif (lihat ms 637E–F; *Ang Tiong Seng v Goh Huan Chir* [1970] 2 MLJ 271 dan *R v Bateman* (1925) 94 LJKB 791; [1925] All ER Rep 45 diikut).

(6) Ketiadaan keratan penyata gaji untuk menyokong tuntutan plaintif untuk kehilangan pendapatan masa hadapan tidak boleh ditafsirkan menentang beliau memandangkan keterangan menyokong ibu plaintif bahawa plaintif telah menyumbangkan wang kepadanya telah tidak dicabar. Keterangan menunjukkan bahawa plaintif mendapat RM500 sebulan sebelum beliau menjadi buta dan oleh itu RM36,000 akan diaward untuk kehilangan pendapatan masa hadapan (lihat ms 638A–B; *Chan Peng Fook v Kan Pak Lee* [1974] 2 MLJ 197 dan *Lim Ah Chi v Tan Ah Mui & Anor* [1969] 1 MLJ 215 diikut).

(7) Kehilangan penglihatan kepada mata kanan plaintif menyebabkannya menjadi buta sepenuhnya dan oleh itu jumlah sebanyak RM60,000 telah diberikan kepadanya sebagai ganti rugi am (lihat ms 638G; *Low You Choy & Anor v Chan Mun Kit & Anor* [1992] 3 CLJ 1550 dan *Toh Ming Jee v Lau Yiik Ung* (Civil Suit No 198–1979 High Court, Sibu) (tidak dilaporkan) diikut).

(8) Tiada faedah akan terakru ke atas kehilangan pendapatan masa hadapan (lihat ms 638H; *Cookson v Knowles* [1978] 2 All ER 604 diikut).

Notes

For a case on adducing evidence of an unpleaded defence see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2568.

For cases on departure from pleadings see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2572–2576.

For cases on recalling witnesses see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3640–3641.

For cases on adverse inference for failing to call a witness under s 114(g) Evidence Act 1950 see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 87–97.

For cases on professional negligence see 12 *Mallal's Digest* (4th Ed) paras 357–375.

For cases quantum of damages for eye injuries see 6 *Mallal's Digest* (4th Ed) paras 654–666.

For cases on loss of future earnings see 2 *Mallal's Digest* (4th Ed) paras 506–508.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359
Ang Tiong Seng v Goh Huan Chir [1970] 2 MLJ 27
Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 3 MLJ 287
Baylill v Gringley Children's Hospital Lancet (cited in Mehta *Medical Law and Ethics in India* (1963) at 207)
Blay v Pollard & Morris [1930] 1 KB 628
Bolam v Friern Hospital Management Committee [1957] 2 All ER 118
Browne v Dunn (1893) 6 R 67
Chan Peng Fook v Kan Pak Lee [1974] 2 MLJ 197
Chartered Bank v Yong Chan [1974] 1 MLJ 157
Chin Keow v Government of Malaysia & Anor [1967] 2 MLJ 45
Chua Beow Huat v PP [1970] 2 MLJ 29
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd [1990] 1 MLJ 356
Cookson v Knowles [1978] 2 All ER 604
Farrel v Secretary of State for Defence [1980] 1 All ER 166
K Ratnasingam v Kow Ah Dek & Anor [1983] 2 MLJ 297
Lai Chi Kay & Ors v Lee Kuo Shin [1981] 2 MLJ 167
Lai Wee Lian v Singapore Bus Service (1978) Ltd [1984] 1 MLJ 325
Lim Ah Chi v Tan Ah Mui & Anor [1969] 1 MLJ 215
Low You Choy & Anor v Chan Mun Kit & Anor [1992] 3 CLJ 1550
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416
Murtadza bin Mohamed Hassan v Chong Swee Pian [1980] 1 MLJ 216
Murugan v Lew Chu Cheong [1980] 2 MLJ 139
Ong Yoke Eng & Anor v Lim Ah Yew [1982] 1 MLJ 226
PR Panickar v Chwee May Kwong & Anor [1958] MLJ 136
R v Bateman (1925) 94 LJ KB 791; [1925] All ER Rep 45
Toh Ming Jee v Lau Yiik Ung (Civil Suit No 198–1979 High Court, Sibu) (unreported)

Legislation referred to

Evidence Act 1950 s 114(g)
Medical Act 1971

Mohd Fairuz Abdullah (*Zaman & Associates*) for the plaintiff.
Wan Mansor bin Wan Mahmood (*Roslani & AJ Ariffin*) for the defendant.

Cur Adv Vult

Abdul Malik Ishak J: Without mincing words, this was a case of bad treatment where the plaintiff went in with a fairly good right eye and came out blind as a bat. It reminded me of the case of *Baylill v Gringley Children's Hospital Lancet*, cited in Mehta *Medical Law and Ethics in India*,

1963 at p 207 where Stable J found the hospital guilty of negligence where a child who went in with a healthy left leg came out a cripple.

The plaintiff came to know of the defendant after reading a newspaper advertisement sometime on 21 July 1985 and that advertisement extolled the virtues of the defendant as a traditional eye healer. This prompted the plaintiff to proceed to the defendant's premises at Sungai Balang, Batu Pahat and there the plaintiff submitted to the defendant who, in due course, performed two eye operations using an ancient method known as couching which resulted in the loss of vision to the right eye of the plaintiff. It was not in dispute that, at the material time, the defendant was practising as a traditional healer under the Medical Act 1971. The plaintiff now claimed for special and general damages against the defendant.

In his evidence, the plaintiff narrated that he lost the sight of his left eye in a road accident that occurred in 1965. Four to five years after that road accident, the vision of his left eye was restricted to 50%; it worsened and eventually his left eye became blind. Dr Voon Chee Cheng (PW2—'Dr Voon'), an eye specialist, testified and she categorically diagnosed the plaintiff's left eye as having chronic iridocyclitis, an inflammation of the iris and ciliary body. Dr Voon testified that chronic iridocyclitis could be caused by previous trauma to the left eye, for instance an accident in a car, which would be followed, after a span of four to five years, by chronic iridocyclitis. The plaintiff admitted that after the road accident he was unconscious and on regaining consciousness he found himself in the hospital with his left eyebrow cut. Dr Voon was categorical when she said that an ordinary medical officer would not be able to detect the damage to the left eye of the plaintiff at the material time except to suture the injury to the left eyebrow of the plaintiff. Dr Voon further confirmed that the severe knock must have been located at the left eyeball itself. Of pertinence, Dr Voon emphatically stated that the blindness of the left eye cannot spread to that of the right eye. This damning piece of evidence cuts across the defendant's version that the blindness of the left eye was responsible for the blindness to the right eye of the plaintiff.

The plaintiff testified that the problem with his right eye started sometime in 1983. In 1985, the vision to his right eye was only about 50% and he could see objects within a range of 12 ft. He was also able to read newspapers, watch television and walk like any ordinary person. When the plaintiff went to see the defendant, the latter gave assurances that he could treat the plaintiff's right eye. The defendant proceeded to examine both eyes using a torch light and confirmed that he could cure the right eye within 14 days. The defendant told the plaintiff that he needed to remove the cataract from the plaintiff's right eye. In an outburst of emotion, the plaintiff testified that:

> Saya cari awak (referring to the defendant) sebab awak mengiklankan kepakaran awak. Dan apabila saya tanya awak, awak kata awak boleh rawat mata kanan saya.

The defendant also represented to the plaintiff that he was registered with the Ministry of Health and that his practice was insured. The defendant took pains to convince the plaintiff that he had successfully treated other patients with similar eye conditions. The defendant even guaranteed that he

could cure the plaintiff's right eye. It is now crystal clear that the defendant had not disputed nor challenged the representations as alluded to earlier. As a patient, the plaintiff must have expected to be treated well and from the available evidence he must have relied on the defendant's representations and advice.

It must be borne in mind that when the plaintiff saw the defendant, the purpose was solely to treat and cure the plaintiff's right eye. At all material times, the plaintiff's left eye was already blind.

The plaintiff narrated the harrowing experience that he went through in vivid detail. This was what he said:

> Wahab ambil satu alat dan cengkang mata saya dan mata saya terbuka dan Wahab ambil ubat mata dan pancit, macam biuslah gitu. Wahab pancit, pancit dan selepas itu Wahab biarkan dalam sepuluh minit dan selepas itu Wahab balik semula dan bawa alatan-alatan macam hospital. Wahab suruh saya baring dan dia ambil alat penyepit. Wahab tekan kuat ke mata kanan saya dan dia tarik perlahan-perlahan.
>
> Reaksi spontan saya bila Wahab tarik mata kanan saya, saya rasa sakit tetapi sakit boleh tahanlah. Saya tidak menjerit kesakitan sebab saya masih boleh tahan. Saya pun tidak suruh Wahab berhenti.

The defendant must have used that 'penyepit' to couch the plaintiff's right eye in a purported eye operation. Siti Halijah bte Abek (PW4—'Siti'), the sister-in-law of the plaintiff, testified that she saw the 'penyepit' in a room cum clinic when she visited the plaintiff. It is germane to mention that the existence of the 'penyepit' was not disputed by the defendant. In fact, the defendant described the equipment as 'penyepit' mata. Mr Wan Mansor bin Mahmood, learned counsel for the defendant, argued that when the officers from the Ministry of Health inspected the defendant's premises nothing was found to show that the defendant had contravened any law. It must not be forgotten that an inspection by the enforcement officers from the Ministry of Health was averted to in a letter dated 28 June 1986 from the Director General of the Ministry of Health addressed to the plaintiff and such an inspection was carried out 11 months 4 days after the second operation was carried out on the plaintiff by the defendant. No wonder an inspection of the defendant's premises proved futile. The plaintiff testified that he stayed at the defendant's premises for at least ten days. The defendant under cross-examination stated that he took 15 days to wash the plaintiff's right eye. It was during this period of time that the defendant performed two eye operations on the plaintiff's right eye. The defendant, on the other hand, testified that during this period of time he merely:

> ... pakai air yang dijampi dengan ayat Quran untuk cuci mata plaintif. Saya cuci dengan air Optrex yang dihalalkan oleh mahkamah. Saya tidak gunakan bahan-bahan lain untuk dicuci. Kebiasaannya penyakit plaintif ini selepas dicuci selama sepuluh hari, insya Allah baik, serah kepada Allah. Saya serah kepada Tuhan sama ada mata plaintif boleh baik.

It is my judgment that throughout the testimony of the defendant, the defendant had tried to distant himself from the fact that he had treated the plaintiff. At one stage, the defendant even suggested that the plaintiff had gone to a different place for treatment. Yet on another occasion, the defendant suggested that the plaintiff's right eye became blind because of

the infection from the left blind eye. At the end of the day, one is left with no doubt that the defendant could no longer hide his skeleton in the closet.

In his testimony the defendant insisted that he only cleared the plaintiff's right eye with eye drops and became extremely agitated when the word 'treatment' was used. But somehow the list of things which a patient should adhere to during treatment as reflected at p 3 of the agreed bundle of documents was in the possession of the plaintiff and this meant that the plaintiff was treated by the defendant. Incidentally, the denial by the defendant that he had treated the plaintiff must surely be held against the defendant as it runs counter to para 3 of the statement of defence where the defendant averred that:

> Save that the plaintiff turned up at the defendant's premises for eye treatment, paragraph 3 of the statement of claim is denied.

It is now trite law that when a party in giving his oral evidence in court deviates from his pleaded defence, then his account as narrated to the court must surely be suspect (see *PR Panickar v Chwee May Kwong & Anor* [1958] MLJ 136). The importance of pleadings can never be overstated. Lord Edmund Davis in *Farrel v Secretary of State for Defence* [1980] 1 All ER 166 in cogent terms made these observations:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

It was argued that there were material discrepancies in the plaintiff's testimony in respect of the spontaneous reaction of the plaintiff during the treatment. As stated earlier there were two eye operations. The first was on 22 July 1985 where the plaintiff admitted that he was able to bear the pain. The second was on 24 July 1985 where the plaintiff cried because of the severe pain. The plaintiff testified:

> Pada 24 Julai 1985 Wahab operate sekali lagi dan bila dia operate mata kanan saya itulah saya tidak sedar diri, perasan saya mata saya, kepala saya sakit macam kena gigit tebuan, saya menangis terlalu sakit. Darah itu keluar daripada mata kanan saya meleleh-meleleh tidak berhenti.

and clearly this must have been the extent of the excruciating pain suffered by him.

The plaintiff testified further with regard to the second operation in these words:

> Mata saya sakit, Wahab kasi saya pill, dua atau tiga, empat macam untuk makan. Pill ada capsule pun ada. Masa itu mata kanan saya tidak nampak, keluar darah, saya mengerang kesakitan. Masa itu Wahab kata dia takut, dia sudah tersilap.

> Sebelum saya dioperate dua kali, Wahab ada nyatakan bahawa mata kanan saya boleh lihat.
>
> Sekarang mata kanan saya buta disebabkan oleh Wahab yang operate mata kanan saya itu.

In my judgment there were no discrepancies in regard to the reactions of the plaintiff during the first and the second eye operations. Surprisingly, the defendant did not cross-examine the plaintiff with regard to the second operation. But one thing is certain. The defendant used a pair of hinged handles (referred to as 'penyepit') to couch the right eye of the plaintiff. To borrow the words of the plaintiff:

> Alat penyepit macam sepit janggut. Penyepit janggut ini kecil. Alat penyepit yang Wahab pakai besar. Dengan itulah Wahab kopek mata saya.

The unsuccessful right eye operations prompted the defendant to give RM3,000 to the plaintiff to enable the latter to seek further treatment with an eye specialist. This was amply corroborated by a letter of acknowledgment dated 17 September 1985 exhibited in the agreed bundle of documents. The plaintiff testified that the money was given to him after the defendant had made him blind on condition that the plaintiff would not disclose to anyone that his right eye was treated by the defendant. In his testimony, the defendant alleged that that money was given to the plaintiff as a loan. In my judgment the letter of acknowledgment categorically stated that the money was meant for an eye treatment with an eye specialist in Kuala Lumpur; there was no mention at all that the money was meant as a loan as alleged by the defendant. In a show of falsity, the defendant had the audacity to say that he did not read the contents of the letter of acknowledgment and that he merely signed the letter.

Siti corroborated the plaintiff's version. She testified that she received a phone call and was told that the plaintiff was at Sungai Muda, Sungai Balang, Muar. She wasted no time and she proceeded there with her husband and her mother-in-law by the name of Aminah bte Daing (PW3—'Aminah'). She had no difficulty in locating the defendant's place and there she was told that the plaintiff would only return in ten days time. Later the plaintiff's family members came to collect the plaintiff home. The defendant seemed contented and did not cross-examine Aminah on this point. At the end of the day, by necessary inference the plaintiff went to see the defendant for an eye treatment and returned home blind—never to see again. Both Siti and Aminah witnessed the defendant's unabashed confessions in the presence of the plaintiff that he (the defendant) had made mistakes during the eye operations. I have no hesitation in believing both Siti and Aminah on this point. I too, do not doubt the expertise of Dr Voon and sufficient evidence was led to establish this crucial point. Dr Voon had performed about 200 cataract operations before and after she became an eye specialist. Dr Voon confirmed that the plaintiff's right eye showed a severe uveitis with dislocated lens. An examination of the plaintiff's right eye using a torch light revealed that the right eye could only see vague perception of light. This point was vigorously used by the defendant to argue that it went counter to the evidence of the plaintiff who testified that his right eye could not see anything. However, whatever doubt as to the state of blindness of the plaintiff's right eye was put to rest when Dr Voon explained that the plaintiff could not tell in which direction the vague perception of light came from and further that the plaintiff's right eye

could worsen to a non-perception of light. After examining the plaintiff, Dr Voon was of the opinion that the injury sustained by the plaintiff was consistent with the couching procedure being performed on the plaintiff's right eye. The good doctor explained couching in this manner:

> Couching is actually a procedure where a sudden force is applied just outside the cornea to dislocate the lens. The location of the lens would be at the centre of the pupil. The structure at the centre of the pupil is called the lens and the lens has dislocated. The lens has dropped down.
>
> In a couching procedure the lens would completely drop down.

Dr Voon was quite vocal when she said that the blindness to the right eye to the plaintiff was permanent and beyond medical repair. She said:

> I cannot operate and re-locate the lens to its original position. The ligaments attaching the lens to the ciliary body have been damaged. Impossible to repair the ligaments.

When told that the plaintiff had 'selaput', Dr Voon elaborated and stated that this was in fact cataract where the lens had become opaque. Dr Voon added that the lens should be transparent to enable one to see. Dr Voon was categorical when she said that the lens would not simply drop off to the bottom simply by rubbing the right eye or by applying external medicine to the right eye.

Dr Voon further testified and this must surely be an eye-opener in that:

> Nobody in the medical profession uses the couching procedure. This couching procedure is only used by the traditional medicine man. Couching doesn't remove the cataract ('selaput'), it moves the cataract to the bottom of the eye ie at the back portion. We can remove the whole cataract from the eye by making a cut at the edge of the cornea and we then remove the cataract through the incision. This is a simple operation.

Dr Voon admitted that with a high powered spectacle the plaintiff might be able to see with his right eye using his pupil without the presence of the cataract provided there were no complications. Here, the plaintiff's cataract was not removed at all but merely displaced and this must have caused his right eye to react and develop into severe uveitis. In fact Dr Voon confirmed that uveitis will develop progressively and not rapidly. Here since the lens had dropped to the bottom of the eye, severe uveitis had set in. No wonder even though the plaintiff used the high powered spectacle for three solid years his right eye remained totally blind.

It was argued that the presumption under s 114(g) of the Evidence Act 1950 should be invoked against the plaintiff for the failure to call the eye specialist from Kuala Lumpur. There was evidence that the plaintiff went to Kuala Lumpur with his mother and another friend. That friend could not be traced as there was no contact with him after that visit to Kuala Lumpur some ten years ago. Azizah, the plaintiff's mother gave candid and frank evidence. For an old woman of 82 years old she was physically and mentally alert. That visit to Kuala Lumpur turned out to be the first and the last for both the plaintiff and his mother. Azizah did not accompany the plaintiff to see the Indian doctor in Kuala Lumpur upon arrival in Kuala Lumpur. She waited in the car. The defendant took a

perilous course in not cross-examining the plaintiff in regard to the Kuala Lumpur visit. Reference may be made to the case of *AEG Carapiet v AY Derderian* AIR 1961 Cal 359, which was cited in *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29 at p 32. The judgment in the *Carapiet* case was quoted from the decision of the House of Lord's case of *Browne v Dunn* (1893) 6 R 67, where in his judgment, in relation to the cross-examination of witnesses at p 76, Lord Halsbury said:

> My Lords, with regard to the matter in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to give them an opportunity of explanation, and an opportunity very often to defend their own character and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

On adverse inference, Chang Min Tat FJ (as he then was) in *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139 at p 140 said:

> Lastly, I was asked to draw an adverse inference under s 114(g) Evidence Act 1950 against the motorist from the failure to call his travel companion as his witness. His explanation was that he did not know her address. This explanation was unchallenged and must therefore be accepted as sufficient to prevent the raising of the inference.

Now, the defendant blamed Mr Mohd Fairuz Abdullah, learned counsel for the plaintiff, for not recalling the plaintiff to the stand to clarify certain matters in regard to the identity of his friend, that friend's whereabouts, the place of business of the Indian specialist in Kuala Lumpur and whether the plaintiff was in possession of any treatment card from the Indian specialist in Kuala Lumpur. But one must not forget that these questions should have been asked by way of cross-examinations of both the plaintiff and Azizah by the defendant's counsel. At any rate, reference was made to the case of *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226 to drive home the point that it is entirely at the court's discretion to recall a witness after the case is closed in civil proceedings. The facts in *Ong Yoke Eng*'s case were that at the commencement of the trial in a running down case the defendant admitted liability and the trial proceeded solely on the matter of quantum. The plaintiff concluded her case and submissions were made both by the defendant's counsel and the plaintiff's counsel after which the matter was adjourned to a date to be fixed. Subsequently, on 6 May 1981 the plaintiff by a notice of motion applied to court for the plaintiff to be allowed to re-open her case and give further evidence and also to call a witness who was a coffee-shop assistant. The defendant's counsel objected to the application. Arulanandom J (as he then was) allowed the plaintiff's application and held that in civil proceedings it is the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed; although under ordinary circumstances it may not be necessary or permissible to allow a witness once examined and dismissed by a party to be recalled for it is expected that the advocate will interrogate him on all material points touching his case, unforeseen situations may develop and there may be also inadvertent omissions. Clearly on the facts, *Ong Yoke Eng*'s case can be differentiated from the present case. Here, there was no application by Mr

Mohd Fairuz Abdullah to recall the plaintiff by way of a notice of motion. In fact there was no inkling whatsoever that the plaintiff would be recalled to clarify those matters as set out earlier. Though I subscribe to the principle as enunciated in *Ong Yoke Eng*'s case, yet it is of no utility to the present case.

In his defence, the defendant revealed that he started his traditional medicine way back in 1955 and confined himself to eye treatment. He said his skill was derived from his father and that his clinic had been registered with the Ministry of Health. But surprisingly with 30 years of experience the defendant was not able to diagnose the ailment to the plaintiff's right eye. This was what the defendant said under cross-examination:

> Saya tidak tahu apa penyakit mata yang dialami oleh plaintiff. Saya main suluh dengan lampu picit, boleh atau tidak boleh ubat, itu sahaja saya tahu. Maksud saya, saya bergantung kepada nasib. Saya bukan pakar bedah.

Notwithstanding his ignorance, the defendant had the audacity to say that he could cure cataract by merely using the jampi method. The defendant seemed to project himself as a faith healer when it was put to him the following question:

> Put: Bagi rawatan selaput mata (cataract) dengan membuang selaput mata dan bukan secara basuh atau cuci.
>
> Answer: Insya Allah cuci pun boleh baik, jika diizinkan Allah.

If this was the line of defence of the defendant it came too late in the day as nothing of this sort appeared in the statement of defence. It is now trite law that parties are bound by their pleadings and are not allowed to adduce facts which they had not pleaded. By way of an illustration *Chartered Bank v Yong Chan* [1974] 1 MLJ 157 is a classic example. There the respondent brought an action against the appellant bank for wrongful dishonour of a cheque drawn by the respondent on a partnership account with the appellant bank. Although the act by the appellant bank gave rise to two possible causes of action, namely, an action for damages for breach of contract and in tort for libel, the case made against the bank in pleadings rested entirely on an allegation of libel. At the trial, it was discovered that the action founded on libel was statute-barred by virtue of item 11 of the Sch to the Sabah Limitation Ordinance (Cap 72). However, the trial judge awarded a sum of RM1,000 by way of damages for breach of contract. The then Federal Court held that the learned trial judge was wrong when he concluded that the pleadings included a claim for breach of contract as well as a claim for libel. Since the trial judge had decided on an issue not raised on the pleadings, the judgment was set aside. Scrutton LJ in erudite terms explained the law in *Blay v Pollard & Morris* [1930] 1 KB 628 at p 634 in these words: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.' In the present case, there was no application to amend the statement of defence at any time by the defendant in the course of the trial. The following cases like *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356; and *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287 are cogent examples where the courts there disallowed the parties from raising points that were not pleaded at all.

Be that as it may, as a faith healer the defendant had two ardent followers. Misman bin Rasid (DW2—'Misman'), a retired school teacher, testified that initially the defendant treated his cataract-infected left eye using eye drops and citing Quranic verses, which treatment proved successful. Later, the defendant also treated his cataract-infected right eye using the same procedure successfully. Misman testified that the defendant diagnosed his eye infection as cataract which must surely run counter to the defendant's version who said that he did not know what eye problem the plaintiff had and that he relied on pure luck. Misman testified further that the defendant did not use any instrument to dig his eye nor press his eye with that instrument. Haji Ibrahim bin Abdul Ghani (DW3—'Haji Ibrahim'), a police pensioner, testified that before he retired his cataract-infected left eye was operated on by the doctors at the Sultanah Aminah Hospital, Johor Bahru successfully. After his retirement, his right eye became cataract-infected and notwithstanding that he could seek medical treatment from the government doctors, he decided to seek treatment from the defendant. Haji Ibrahim testified that the defendant treated him the same way as Misman was treated and that treatment was successful. If what Misman and Haji Ibrahim had said could be believed, Malaysians would flock and stampede the defendant's clinic for instant cataract cures without having to undergo painful eye operations at the general hospitals. Eye specialists throughout the country would have to retire early to make way for the defendant. But, is that the real scenario? There was one striking similarity between Misman dan Haji Ibrahim. Both agreed under cross-examination that they would not know the other methods employed by the defendant to treat other patients. What is certain is this. Had both of them been treated the same way as the plaintiff was, then both of them would be blind. In my judgment, Misman and Haji Ibrahim were not couched by the defendant and, if they were, they would be blind and they would not be testifying for the defendant. In my judgment, had the plaintiff been treated by the defendant like what Misman and Haji Ibrahim went through, in all probabilities the plaintiff's right eye would not go blind. There is only one cure for an ailing cataract-infected eye and that is by way of an operation as explained by Dr Voon.

Just like a medical practitioner, a traditional eye healer like the plaintiff owes a duty of care to his patient. I have anxiously perused through the evidence and it is my judgment that the defendant was in breach of that duty of care when he couched the plaintiff's right eye. The causal link between the cause and effect was clearly established on the balance of probabilities.

McNair J, in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, especially at p 121, spoke of the meaning of the word negligence in relation to a medical practitioner. This was what his Lordship said:

> Before I turn to that, I must explain what in law we mean by 'negligence'. In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it

> has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

It is obvious that the law does not impose a very high standard. The question to ask is whether what the defendant did was in accordance with the practice accepted by reasonable persons. Although traditional medicine does play a role in our society, yet it is wrong for a traditional eye healer like the defendant to conduct an eye operation if he is not trained to perform it. In *Chin Keow v Government of Malaysia & Anor* [1967] 2 MLJ 45 (PC), a medical practitioner prescribed procaine penicillin without any inquiry into the patient's medical history which resulted in the patient's death. Sir Hugh Wooding delivering the judgment of the Board adopted the test propounded by McNair J in *Bolam v Friern Hospital Management Committee* and held that the doctor was negligent.

I am reminded of the case of *R v Bateman* (1925) 94 LJKB 791; [1925] All ER Rep 45 especially at p 48 when confronted with the various representations made by the defendant to the plaintiff in convincing the latter to seek treatment with the defendant as set out in the early part of this judgment. In that case, the proposition of law as propounded by Lord Hewart CJ is still germane till today and can best be quoted in verbatim as follows:

> If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward ... The law requires a fair and reasonable standard of care and competence. This standard must be reached in all the matters above mentioned. If the patient's death has been caused by the defendant's indolence or carelessness, it will not avail to show that he had sufficient knowledge; nor will it avail to prove that he was diligent in attendance if the patient has been killed by his gross ignorance and unskilfulness ... As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man.

Since the standard of a qualified man can be used as a barometer to measure the standard of a traditional eye healer like the defendant, it follows that the defendant had fallen short of that standard and must be held responsible for causing the blindness to the right eye of the plaintiff. The standard of care and skill of a Chinese sinseh was scrutinized in the Singapore case of *Ang Tiong Seng v Goh Huan Chir* [1970] 2 MLJ 271 (CA) where Tan Ah Tah J said:

Counsel for the third defendant submitted before us that the third defendant was not a qualified medical practitioner and that therefore the standard of care and skill to be expected from him was not as high as the standard to be expected from a qualified medical practioner. In the circumstances of this case we do not find it necessary to deal with the question as to the standard of care and skill to be expected from a Chinese physician as compared with a qualified medical practitioner. Even if it is assumed in favour of the third defendant the standard of care and skill to be expected from him was not as high as that to be expected from a qualified medical practitioner we are of the opinion that he was guilty of a high degree of negligence in his treatment of the plaintiff's left arm. We refer particularly to the very tight bandage applied to the plaintiff's arm and to the failure of the third defendant to remove the bandage in order to inspect the arm when the plaintiff complained of severe pain. In fact the bandage was never removed by the third defendant after he had applied it to the plaintiff's arm. On the fourth visit made by the plaintiff to the third defendant when the plaintiff discovered blood oozing out from underneath the bandage and saw 'bubbles' on his left hand it was obviously too late for the third defendant to do anything because he sent the plaintiff to the general hospital immediately.

Likewise here there was a high degree of negligence exhibited by the defendant when after couching the right eye of the plaintiff by using a pair of hinged handles ('penyepit') on 22 July 1985, the defendant applied the same couching procedure on 24 July 1985 which led to the total blindness of the plaintiff's right eye.

It is my judgment that the standard of care and skill of a traditional eye healer like the defendant who is registered under the Medical Act 1971 is at par with that of a medical practitioner. The standard would be that of an ordinary skilled man exercising and professing to have that special skill and it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I have, accordingly, no hesitation, on the evidence, to enter judgment for the plaintiff with costs.

Quantum

With regard to special damages, I made the following orders:

(1) Transport fares to and from the defendant's premises in Batu Pahat totalling	RM	80
(2) Transport fares to the Sultanah Aminah Hospital, Johor Bahru For 35 trips at RM10 per trip totalling	RM	350
(3) Loss of future earnings for six years at RM500 per month, giving a total of	RM	36,000

In 1985 the plaintiff was 49 years of age. The acceptable retiring age according to the authorities would be 55 years (see *Lai Chi Kay & Ors v Lee Kuo Shin* [1981] 2 MLJ 167 at p 171; *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] 1 MLJ 216 at p 218 and *K Ratnasingam v Kow Ah Dek & Anor* [1983] 2 MLJ 297 at p 301). Thus, the loss of future earnings would be computed for a period of six years. There was evidence that the plaintiff was self-employed and he stated that prior to 21 July 1985 he used

to work as a log broker and, subsequently, as a driver of an unlicensed private car. The plaintiff testified that he earned at least RM500 per month and on the average his brokerage fees were about RM20 to RM30 per day. Even though the plaintiff admitted that there were no salary slips, this cannot possibly be construed against the plaintiff. The plaintiff's mother corroborated the plaintiff's version and her evidence was unchallenged when she said that he had contributed to her financially prior to being blind. In *Chan Peng Fook v Kan Pak Lee* [1974] 2 MLJ 197, Hashim Yeop A Sani J (as he then was) said:

> As regards his claims for loss of earnings the plaintiff did not call either his old employer who paid him on piecemeal basis or his present employer who is alleged to be paying him on a monthly basis. But what is in evidence and not disputed is that the plaintiff is a carpenter. Assessing his earning as that of an average carpenter, I would put his average income as RM150 per month.

In *Lim Ah Chi v Tan Ah Mui & Anor* [1969] 1 MLJ 215 (FC), the then Federal Court used its own understanding of conditions prevailing in regard to a one-man business of selling 'pow' to arrive at the deceased's earnings prior to his death.

From the available evidence, I ruled that the plaintiff was earning RM500 per month before he became blind and, accordingly, this figure was used to ascertain the loss of future earnings of the plaintiff for a period of six years.

On general damages, two authorities in regard to blindness should be referred. The first would be the case of *Low You Choy & Anor v Chan Mun Kit & Anor* [1992] 3 CLJ 1550 where blindness to the left eye attracted a sum of RM50,000. The second is the case of *Toh Ming Jee v Lau Yiik Ung* (Civil Suit No 198–1979 High Court, Sibu) (unreported) where for loss of sight to the right eye the court awarded RM75,000. In these cases, the claimants had another eye left to see the world with, so to speak. Here, the defendant knew that when he treated the right eye of the plaintiff, the plaintiff's left eye was already blind. The loss of sight to the right eye of the plaintiff rendered him totally blind and for this reason a sum of RM60,000 was awarded to him. On reflection, I thought that the figure was on the lower scale bearing in mind the peculiar circumstances of this case.

With regard to interest, I awarded 8% per annum for special damages from 24 July 1985 to date of payment or realization. On the authority of *Cookson v Knowles* [1978] 2 All ER 604, no interest would accrue for loss of future earnings.

For general damages, an interest of 6% pa from the date of filing the writ to the date when judgment was ordered.

Claim allowed.

Reported by Izzaty Izzuddin